IN THE

Supreme Court of the United States

October Term, 1978
No. 78-294

SOUTHERN CALIFORNIA EDISON COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, D. W. HOLMES, WILLIAM SYMONS, JR., VERNON L. STURGEON, LEONARD ROSS, and ROBERT BATINOVICH, the members of and constituting said Public Utilities Commission,
Appellees.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

Southern California Edison Company ("Appellant") appeals from an order of the Supreme Court of the State of California entered on May 25, 1978, denying a petition for a rehearing of that court's decision filed on March 23, 1978. That decision upheld Decision No. 85731, dated April 27, 1976, of the Public Utilities Commission of the State of California (the "Commission"). Notices of appeal were filed on August 3, 1978. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and should exercise its jurisdiction to determine the substantial federal question presented.

Opinion Below.

The decision of the California Supreme Court of March 23, 1978, is reported at 20 Cal. 3d 813, and the order denying rehearing is reported at 21 Cal. 3d Adv. Sh. No. 17 (Cumulative Subsequent History Table), p. 76. Decision No. 85731 of the Public Utilities Commission is not officially reported. A copy of each of the foregoing, together with a copy of the notices of appeal, is included in the Appendix.

In addition, the Appendix includes Appellant's Petition for Rehearing before the Commission, Appellant's Petition for Writ of Review in the California Supreme Court, the Commission's Answer to that Petition, Appellant's Reply Brief, Appellant's Petition for Rehearing before the California Supreme Court and the Commission's Answer thereto. These documents show, among other things, that Appellant timely raised the constitutional issue that is the subject matter of this appeal, although the California Supreme Court did not address that issue. Finally, the Appendix includes Commission Decision No. 79838, dated March 21, 1972, officially reported at 73 Cal. Pub. Util. Comm'n. 180, *modified* 73 Cal. Pub. Util. Comm'n. 257, the significance of which will become apparent in the Statement of the Case below.

Jurisdiction.

This appeal is brought to review a final judgment of the California Supreme Court upholding Commission Decision No. 85731. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2) (1970). The following decisions hold that a Commission order such as Decision No. 85731 is a "statute" within the purview

of 28 U.S.C. § 1257(2): *Atchison, Topeka & Santa Fe Railway v. Public Utilities Commission of California,* 346 U.S. 346, 348 (1953); *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia,* 262 U.S. 679, 683 (1923); *Lake Erie & Western Railroad Co. v. State Public Utilities Commission of Illinois,* 249 U.S. 422, 424 (1919).

The Supreme Court of California is the highest court of that state. The validity of Commission Decision No. 85731 was drawn into question in the California Supreme Court on the ground of its being repugnant to the Constitution of the United States, and the decision of the California Supreme Court was in favor of such statute's validity. Appellant attacked the constitutionality of the statute in its Petition for Rehearing before the Commission and by this means timely raised the issue for consideration by the Commission and, on Petition for Review, by the California Supreme Court. Cal. Pub. Util. Code § 1732 (West 1975); *Southern Pacific Transportation Co. v. Public Utilities Commission,* 18 Cal. 3d 308, 311-12 n.2 (1976).

If for any reason appeal is not considered the proper mode of review, Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103 (1970).

Statute Involved.

The statute involved is, as noted above, Decision No. 85731 dated April 27, 1976, of the Commission. The entire decision is lengthy and for that reason is not set forth here in full. The portions of the order at the end of the Decision that are involved in this case are as follows:

ORDER.

IT IS ORDERED that:

1. Each respondent utility, within twenty days after the effective date of this order, shall file:

a. Data indicating the amount of over or under collection of fuel clause revenue compared to increased fuel cost expense on an actual recorded basis from the inception of its respective fuel clause through the latest available date.

* * * *

2. The staff shall:

* * * *

b. Recommend the amounts of over or under collection determined under respondents' respective fuel clauses through the latest available date.

c. Recommend a rate adjustment for each utility based on the determination in (b) above,

. . . .

Question Presented.

Is Commission Decision No. 85731, which requires Appellant to refund to its ratepayers a portion of the revenues theretofore lawfully collected by Appellant in complete accordance with final orders of the Commission in effect at the time they were collected, an unconstitutional deprivation of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution?

Statement of the Case.

Appellant is a public utility, engaged in the production, transmission and distribution of electric energy. Its rates are regulated by the Commission. In 1972, when the price of fossil fuels was escalating, the Commission adopted Decision No. 79838 (Appendix, pp. 231-262). That decision authorized Appellant to include in its tariffs a "fuel clause." That clause contained a formula pursuant to which Appellant's rates for electric service could be increased as the price of fossil fuels increased, provided designated procedures were followed. Fuel prices continued to rise after the Decision became effective, and Appellant from time to time adjusted its rates upward in accordance with the fuel clause, using the formula and the procedures spelled out therein. All revenues collected by Appellant during the period the fuel clause was in effect were admittedly lawful, proper, and in complete accordance with all final orders of the Commission (Decision No. 85731, Appendix, p. 43).

On March 18, 1975, long after Appellant had collected substantial revenues pursuant to rates affected by the fuel clause, including substantially all the revenues involved in this case, the Commission noticed hearings that ultimately resulted in Decision No. 85731, dated April 27, 1976 (Appendix, pp. 41-76). In that decision the Commission found that during 1972-76 Appellant's revenues had increased more as a result of adjustments to its rates under the fuel clause than had its actual expenses for fossil fuels. This was not due to any error in the calculation or application of the fuel clause adjustments nor in the fuel prices used in the formula prescribed by the Commission. It was due entirely to

the fact that the adjustment formula utilized a forecast of fossil fuel consumption based on average weather conditions, and in these years, in the aggregate, the weather was wetter and warmer than average. As a result, the amount and mix of fossil fuels that Appellant actually used during these years was different from the forecast. Such deviations of actual experience from forecasts used in ratemaking are not unexpected or unusual. Traditionally in California electric utility rates have been based on forecasts which assume that average conditions affecting energy and fuel requirements and supply will prevail. *Southern California Edison Co.*, 25 C.R.C. 475, 478 (1924).

During this same period of time Appellant incurred other kinds of expenses which were greater than had been forecast in fixing Appellant's rates. Foremost among these expenses was the cost of purchasing an above-average amount of hydroelectric power, which was available due to the unusually wet weather. These purchases reduced Appellant's reliance on fossil fuels for electric generation and thus, in part, accounted for Appellant's reduced consumption of fossil fuels. Other expenses that exceeded forecasted amounts included the cost of materials, labor, environmental protection, taxes and debt. As a consequence, despite what the court below calls an "over-collection" under the fuel clause, Appellant's actual rate of return exceeded the rate determined by the Commission to be the required minimum in only one year—1974—during this five year period. That excess was minimal, and the average rate of return over the entire period was below the required minimum.

Nevertheless, in Decision No. 85731, the Commission, by a three to two decision, ordered Appellant

retroactively to recompute its rates and charges for service from March 21, 1972 to April 27, 1976 as though an adjustment formula based on its actual, after the fact, fuel costs had been in effect rather than the previously prescribed fuel clause formula, and then to determine the difference between Appellant's actual revenues during the period and the revenues it would have received had the rates and charges for service arrived at by this recomputation been in force. That difference plus interest thereon was ordered refunded through a reduction in Appellant's rates in the future over a three-year period.* This retroactive adjustment addressed only the fossil fuel component of Appellant's rate structure. Neither Appellant's above-average costs for hydroelectric power nor any of its other escalating costs was considered in recomputing the rates. The amount of the refund, if made, would be at least $133 million (Opinion, Appendix, p. 13 n.17), and would reduce Appellant's actual rate of return in each year during the 1972-1976 period, including 1974, substantially below the rate of return determined by the Commission to be the required minimum.

Appellant challenged the propriety of this order under state law and as a taking of property without due process and violative of the Constitution under *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926) (Petition for Rehearing before the Commission, Appendix, pp. 89, 90-91; Petition for Review, Appendix, pp. 123, 143; Reply Brief, Appendix, p. 181; and Petition for Rehearing before

*The Commission stayed this part of the Order pending Appellant's attack on it in the appellate courts. The stay remains in effect.

the California Supreme Court, Appendix, p. 213). The basis of Appellant's attack under both state and federal law was the retroactive nature of Decision No. 85731. The California Supreme Court recognized the retroactive nature of the order (Opinion, Appendix, pp. 21-22) but held, in a four to three decision, that it was nevertheless valid under state law. To reach this result the court drew a heretofore unheard of distinction between what it called "general rates," which it said result from "true ratemaking" proceedings, and rates affected by a "narrowly restricted and semi-automatic . . . adjustment clause" such as the fuel clause (Opinion, Appendix, pp. 18-22). The court then held that, under state law, rates in the latter category could be changed retroactively even though, under well established precedent, rates in the former category could not.

The California Supreme Court did not address the constitutional challenge to the Commission's order. The distinction the court drew between general rates and rates affected by an adjustment clause was not offered by the court as an answer to that challenge and does not answer it for reasons that shall hereafter appear.

The Question Is Substantial.

COMMISSION DECISION NO. 85731 IS AN UNCONSTITUTIONAL DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE IT DOES NOT PURPORT TO DEAL WITH ANY SOCIAL OR GOVERNMENTAL NEED OF PUBLIC IMPORTANCE AND PERSONS AFFECTED BY IT SUCH AS APPELLANT COULD HAVE

AVOIDED ITS RETROACTIVE IMPACT HAD THEY BEEN FOREWARNED OF ITS IMPENDING ADOPTION.

This Court in a long line of cases has consistently held that the existence or absence of two factors determine whether retroactive state legislation is a valid exercise of the police power or, on the other hand, invalid under the Fourteenth Amendment as a taking of property without due process of law. Those two factors are (1) whether the legislation is calculated to deal with a current social or governmental need of public importance and (ii) whether persons affected by the retroactive legislation could have avoided its impact had they been forewarned of its impending adoption or, put another way, whether such persons relied on the existing state of the law to their detriment. If the legislation is calculated to deal with a fundamental need of public importance, and if persons affected by it could not have avoided its impact had they been forewarned, the legislation will be upheld. If the opposite is so, it will be struck down. Under this test Decision No. 85731 must be struck down.

First, there is no pretense that the ordered refund will meet any fundamental social or governmental need. On the contrary, Appellant's rate of return was, on the average, below the amount found by the Commission to be the minimum reasonable rate. The Commission itself admits that in ordering the refund it was moved by nothing more than the uninformed reaction of some undisclosed segment of the public (Commission's Answer to Petition for Rehearing before the California Supreme Court, Appendix, p. 265). Second, had Appellant been forewarned that revenues law-

fully collected by it under the fuel clause would someday have to be refunded, it could have taken action to protect itself; it could have sought earlier rate relief before the Commission that would have taken into account its other escalating costs, thereby offsetting the effect of the refund and retaining a rate of return closer to the minimum reasonable rate.* These circumstances condemn Decision No. 85731 as violative of due process.

Allied Structural Steel Co. v. Spannaus, 98 S.Ct. 2716 (1978), is the most recent in the line of cases mentioned above. That case struck down as an unreasonable impairment of contract a Minnesota statute that imposed on employers a retroactive change in their obligations under contractual pension plans in specified circumstances. In brief, regardless of the vesting provisions of a particular plan, any employer having certain characteristics described in the statute who discontinued his pension plan or withdrew his business from the State of Minnesota was required to recalculate and if necessary augment his contributions to the pension fund to assure vesting for all Minnesota employees who had more than 10 years' service. The Court first observed that the Contract Clause does not preclude the exercise of the States' police power in all cases where contract rights are affected. 98 S.Ct. at 2721. Then, after enumerating several factors that had been considered significant in an earlier case in determining

*In fact, Appellant filed an application on June 7, 1974 for a general rate increase based on the fact that its rate of return on an *average year basis* was below the minimum. Had Appellant known that its then favorable *actual* rate of return would later be reduced by Decision No. 85731, it could have advanced the filing of that application and sought an expedited hearing.

whether a particular impairment went beyond permissible limits, *id.* at 2721-23, the Court's discussion focused on the factors of reliance and public necessity discussed above. Thus the Court first said that the severity of the impairment was important, and that in this case it was severe:

> "Thus a basic term of the pension contract—one which the company had relied on for 10 years—was substantially modified. . . . The Act thus forced a current recalculation of the past 10 years' contributions based on the new, unanticipated 10-year vesting requirement." *Id.* at 2723-24.

The Court went on to note that the legislation retroactively changed the employers' obligations "in an area where the element of reliance was vital . . . ." *Id.*

The Court then noted the absence of any need of public importance:

> "Yet there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem." *Id.*

Evidence that the contrary was so was found in the fact that the act "clearly has an extremely narrow focus." *Id.* at 2725. The analogy to the case at bench is obvious.

While this case was decided under the Contract Clause, the Court suggested that the criteria for determining whether a legislative act is unreasonable are the same whether one proceeds under the Contract Clause or the Due Process Clause. *Id.* at 2721 n.12. *See also Patterson v. Carey*, 41 N.Y.2d 714, 363 N.E. 2d 1146, 395 N.Y.S.2d 411 (1977).

Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1934), applied the same rationale in holding unconstitutional under the Due Process Clause a provision of the Railroad Retirement Act of 1934 which retroactively required railroad companies to finance pensions of former employees. The Court stated:

> "Plainly this requirement alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee. That further sums must be provided by the carrier. The provision is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the Act denies due process of law by taking the property of one and bestowing it upon another." 295 U.S. at 349-50.

Even though *Alton* was a five-four decision, all members of the Court concurred on this point. 295 U.S. at 374, 389 (Hughes, C.J., dissenting, joined by Brandeis, Stone and Cardozo: "I agree with the conclusion that the requirement that the carriers shall pay retiring allowances to such persons [former employees] is arbitrary and beyond the power of Congress.").

In the case at bench there is likewise an alteration of existing rights through a retroactive change in a statutory scheme upon which Appellant had justifiably relied. In the words of *Railroad Retirement Board*, the order here under review is an attempt to use Appellant's future earnings to cover "transactions long since past and closed" and to bestow such legally collected earnings upon other parties. Commission Finding No. 4 in support of Decision No. 85731 (Appendix, p. 62) says plainly that this is what is being done:

> "In ordering a future reduction . . . of rates . . . we are setting future rates because of existing financial inequities due to past performance."

Board of Public Utility Commissioners v. New York Telephone Company, 271 U.S. 23 (1926), struck down an order that would have done exactly that. In that case, the Board found that the telephone company had, through depreciation charges taken in the past and reflected in its past rates, built up a larger depreciation reserve than the Board thought necessary. It ordered the utility to reduce its rates in the future to a level below what was conceded to be the minimum reasonable rate of return, and to make up the difference by a book transfer of amounts from the depreciation reserve to the income account. The Court held that such an order violated the Fourteenth Amendment by imposing confiscatory rates on the utility, since the past accumulations, even though deemed to be excessive, could not be used to offset unreasonably low rates in the future.

> "The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating ex-

penses, including the expense of depreciation, is the company's compensation for the use of its property. If there is no return, or if the amount is less than a reasonable return, the company must bear the loss. Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. *Galveston Electric Co. v. Galveston,* 258 U.S. 388, 395; *Georgia Ry. v. R. R. Comm.,* 262 U.S. 625, 632. And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future." 271 U.S. at 31-34 (citing cases).

New York Telephone has never been questioned and has been cited by this Court and by lower courts in a number of cases. *Los Angeles Gas and Electric Corp. v. Railroad Commission of California,* 289 U.S. 266, 313 (1932); *Smith v. Illinois Bell Telephone Co.,* 282 U.S. 133, 158 (1930); *American Public Gas Association v. Federal Power Commission,* 567 F.2d 1016, 1057 (D.C. Cir. 1977); *State v. Edmisten,* 232 S.E.2d 184, 194 (N.C. 1977); *Secretary of Defense v. Chesapeake & Potomac Telephone Company of Virginia,* 225 S.E.2d 414, 417 (Va. 1976).

The case at bench is a more compelling one than *New York Telephone.* That case assumed that the past revenues exceeded a reasonable rate of return and that the proposed retroactive reduction would serve only to reduce them to a reasonable level. Here, Appellant's actual rate of return exceeded the rate found by the Commission to be the minimum reasonable

rate of return in only one year—1974. That excess was minimal, and the average rate of return for the entire period was below that minimum. The refund ordered would reduce the rate of return in each year, including 1974, substantially below the minimum reasonable rate.

A series of cases involving estate tax legislation has also held retroactive legislation unconstitutional in the circumstances of those cases. *Coolidge v. Long,* 282 U.S. 582 (1931); *Untermyer v. Anderson,* 276 U.S. 440 (1928); *Blodgett v. Holden,* 275 U.S. 142 (1927); *Nichols v. Coolidge,* 274 U.S. 531 (1927); see also *Welch v. Henry,* 305 U.S. 134 (1938) (discussing rationale of above cases).

Cases that have upheld retroactive legislation against constitutional attack have all arisen in other contexts and in fact reinforce what we have just said. Those cases generally justified retroactivity on the basis of the two factors we have mentioned above: First, the legislation was designed to deal with a current social or governmental need of great importance; second, the party affected by the retroactive legislation could not have avoided its impact even if he had been forewarned.

Lichter v. United States, 334 U.S. 742 (1947), upheld contract renegotiation statutes enacted during World War II. These statutes applied to contracts entered into before their adoption but specifically excluded contracts that had been theretofore fully performed. Both of the above factors were present. First, the public need was great; the opinion devotes pages to a description of the urgent need for orderly production of war materials during the greatest national emergency

this country had ever experienced. Second, there was no way that war contractors could have avoided the effects of the renegotiation statutes had they been forewarned that they would be enacted.

These two factors were likewise present in the Portal-to-Portal Pay cases. The history of those cases starts with this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946). That case held that the time expended by an employee in the performance of certain functions preliminary to actual work was fully compensable under the Fair Labor Standards Act. Thereafter, the Portal-to-Portal Pay Act of 1947 was enacted, the net effect of which was to preclude an employee's right to recover these unanticipated amounts. The statute was upheld in a number of cases in the face of the contention that the retroactive application of the Act was a deprivation of property without due process. *See, e.g., Thomas v. Carnegie-Illinois Steel Corp.*, 174 F.2d 711 (3d Cir. 1949); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); *Seese v. Bethlehem Steel Co.*, 168 F.2d 58 (4th Cir. 1948). The two factors mentioned above were present in these cases. First, the legislation was in response to a threat to commerce of serious proportions. The unanticipated liability of coal mine operators alone was estimated at over $5 billion. J. Novak, R. Rotunda and J. Young, Constitutional Law 431 (1978). Second, the extra compensation that was precluded by the Act had not "constituted part of the incentive to work." *Greenblatt, Judicial Limitations on Retroactive Civil Legislation*, 51 Nw. L. Rev. 540, 556 (1956).

An additional factor at least two of these cases considered important was that the rights affected by

the Act had not "passed into a completed transaction" in that the employees had not collected the pay in question or even obtained a final judgment for its payment. *Battaglia v. General Motors Corp.*, 169 F.2d 254, 259 (2d Cir. 1948); *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 64 (4th Cir. 1948). In the case at bench, Appellant had collected all the revenues that have been ordered refunded long before the order was made and had collected most of them even before the proceedings which led up to the order began.

Welch v. Henry, 305 U.S. 134 (1938), cited with approval in *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977); and *Usery v. Turner Elkorn Mining Co.*, 428 U.S. 1, 17 n.16 (1976), noted that statutes levying a tax on income earned during the year in which the statute was enacted but before the date of its enactment, and sometimes even on income earned during the preceding year, had been upheld. The opinion justified this result on the basis of the two factors mentioned above. First, the Court emphasized the governmental need for funds raised by taxes and the difficult and delicate problems that the legislature must face in apportioning the cost of government. Second, the Court noted that the taxpayer could not have altered this conduct to avoid the tax even if he had been forewarned. In this respect the court distinguished the estate tax cases discussed above:

> "In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later

made the taxable event. *Nichols v. Coolidge*, 274 U.S. 531, 542; *Untermyer v. Anderson*, 276 U.S. 440, 445 (citing *Blodgett v. Holden*, 275 U.S. 142, 147); *Coolidge v. Long*, 282 U.S. 582. Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer."

". . . (A) tax on the receipt of income is not comparable to a gift tax. We can not assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one." 305 U.S. at 147-48.

Usery v. Turner Elkorn Mining Co., 428 U.S. 1 (1976), upheld regulations requiring coal mine operators to pay death and disability payments to former employees who had contracted black lung disease. The emphasis of the opinion was on the important current and future social need involved. In contrast, the Court distinguished *Railroad Retirement Board v. Alton Railroad Company, supra*, on the following ground:

"The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business." 428 U.S. at 19.

As we have said, neither of the two factors that run through these cases applies to Decision No. 85731, the Commission order here under consideration. First, there is no pretense that the refund would meet any current governmental or social need. Second, had Appellant been forewarned that the fuel clause adjustments would be reduced, it could have taken action in advance calculated to ameliorate the affect of the reduction coupled with its other cost increases. The reduction, however, was wholly without warning. Every indication in Decision No. 79838 which authorized the fuel clause, the applicable sections of the California Public Utilities Code and the cases was that these rates would not be retroactively changed.

Decision No. 79838 did not give the slightest hint that, should nonaverage weather conditions obtain, retroactive reductions in the fuel clause adjustments would be made. That Decision recognized one and only one situation in which a refund of revenues would be required, *i.e.*, when and if the utility might receive a refund from a fuel supplier (Appendix, pp. 244-253). The Commission's specific attention to this one instance in which a refund might be required denotes a clear recognition that a refund of revenues resulting from the authorized adjustments was not otherwise contemplated.

Section 728 of the Public Utilities Code, as the court below notes, permitted the Commission to fix

or change only those rates "to be *thereafter* observed and enforced."

The general body of utility law uniformly held that the rate payer pays for service, not for any particular element of the utility's costs, that the revenue collected by the utility under final orders of the regulatory authority become its property, and that future rates may not be adjusted to reflect past conditions. See cases cited at pages 13-14 above and *Public Utilities Commission v. United Fuel,* 317 U.S. 456 (1942).

Finally the California Supreme Court had squarely held that utility rates could not be retroactively changed. *City of Los Angeles v. Public Utilities Commission,* 7 Cal. 3d 331 (1972); *Pacific Telephone & Telegraph Company v. Public Utilities Commission,* 62 Cal. 2d 634 (1967).

The fact that the rates in question resulted from adjustments under the fuel clause has no effect on the constitutional principles mentioned above. Each of those adjustments was rooted in Decision No. 79838, which resulted from a plenary ratemaking proceeding that met all the notice and hearing requirements of Section 728 of the California Public Utilities Code, which prescribes the rules for such proceedings. In retroactively changing the methodology that Decision No. 79838 authorized and the adjustments made pursuant thereto, the Commission was retroactively changing Decision No. 79838 itself.

A simple analogy will substantiate what we have said. Decision No. 79838 is analogous to an order directing Appellant to adjust its rates upward or downward from time to time in proportion to changes in the Consumers' Price Index without regard to whether

Appellant's actual costs should change correspondingly. Decision No. 85731 is analogous to an order made years later which finds that Appellant's actual costs did not rise as much as the Consumers' Price Index and directs Appellant to recompute all adjustments it made pursuant to Decision No. 79838, using its actual costs rather than the Consumers' Price Index as the determinant. Clearly Decision No. 79838 is changed by such a subsequent order. Decision No. 85731, here under review, does not merely change retroactively the adjustments that were made pursuant to Decision No. 79838; *it changes that Decision itself.*

If this were not obvious on the face of it, it is made clear by decisions of both the California and other courts in ratemaking proceedings. Thus, in *City of Los Angeles v. Public Utilities Commission,* 15 Cal. 3d 680 (1975) (hereafter *City of Los Angeles II*), the Commission argued that it could not authorize an adjustment clause similar to the fuel clause here in question because adjustments to rates would be made in the future without the hearing required by Section 728. The court rejected that contention, reasoning that the adjustments would flow from the order that authorized the adjustment procedure as part of the general utility tariff, 15 Cal. 3d at 699, and that the hearings leading up to that order would satisfy the requirements of Section 728. In reaching this result, the California Court relied on *Norfolk v. Virginia Electric Co.,* 197 Va. 505 (90 S.E.2d 140) (Va. 1975), which dealt with exactly the same question and reached the same result, concluding with the following statement, which was quoted with approval by the California Supreme Court in *City of Los Angeles II.*

"'[R]ate schedules consist not merely of lists of rates in dollars and cents, but . . . they customarily include provisions that will in various ways affect the rates charged at the time of filing or to be charged thereafter.' The proposed escalator clause is nothing more or less than a fixed rule under which future rates to be charged the public are determined. It is simply an addition of a mathematical formula to the filed schedule of the company . . . ." 15 Cal. 3d at 697.

City of Los Angeles II then went on to reaffirm the proposition that under state law rates may not be retroactively changed. Thus the court noted that the rate orders that would have given the utilities the "windfall" alluded to by the court in that case and emphasized by the court below were annulled, or expressly made conditional and subject to refund pending the outcome of the proceedings, *before they became final.* 15 Cal. 3d at 689 nn.13 and 15. The reason these steps were taken was explained in *City of Los Angeles v. Public Utilities Commission,* 7 Cal. 3d 331, 338 (1972), an earlier decision arising out of the same controversy, and that explanation was quoted with approval in *City of Los Angeles II,* with the court adding the emphasis.

"It follows that, unless the rate order now before us is annulled, it will *become a lawful rate* and that all funds collected pursuant to it would belong to Pacific and not be subject to refund. [¶] In other words, we must annul the rate order now before us, because otherwise the rates therein, which are based in part on the annulled tax expense decision, will *become lawful rates* for the

future and will preclude refunds." 15 Cal. 3d at 706.

Thus when the Commission authorized the fuel clause to be incorporated into Appellant's rate structure in 1972, anyone reading the first *City of Los Angeles* case would have concluded that the fuel clause could not be retroactively changed once the order authorizing it became final. That conclusion would have been reinforced in 1975 when the same pronouncement was made in *City of Los Angeles II.*

Conclusion.

Decisions of this Court in the past 30 years have given federal and state legislative bodies broad latitude to deal with governmental and social problems, even to the extent of upholding retroactive legislation in proper circumstances. At the same time, this Court has consistently held such legislation is not proper unless a current social or governmental need of great importance required legislative action of some kind and persons affected by the retroactive legislation could not have avoided its impact even if they had known it was coming. Those conditions are not met here, as we have shown.

In fact, the decision below, if allowed to stand, will do great public mischief by introducing a major element of uncertainty into the financial condition of many utilities. If, as the court below says, any utility rate that results from the application of an adjustment formula can be retroactively changed even though authorized by a final order of the regulatory authorities, there appears to be no way ever to ratify such a rate; it will always remain subject to retroactive re-

adjustment at a later date. With each passing year the amounts accrued by utilities under adjustment clauses and hence subject to possible refund at a later time will get progressively greater. That billions of dollars will be placed in peril is demonstrated by the fact that the amounts collected by Appellant alone as a result of fuel clause adjustments exceed a billion dollars. Such an element of uncertainty and peril will affect management, labor, lending institutions and the investing and consuming public as the dissenting opinion in the court below points out (Appendix, pp. 24, 37-39).

Based upon the foregoing and the substantial federal constitutional question raised therein, Appellant requests this Court to assume jurisdiction of this case.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1978.

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